Supreme Court No. 9544-6
Court of Appeals No. 34018-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

PERSONAL RESTRAINT OF
EDDIE ARNOLD,
Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. Introduction

The State of Washington has petitioned this court to review the Court of Appeals' decision in *In re: The Personal Restraint of Eddie Arnold,* Court of Appeals Cause No. 34018-0-III.

The facts of this case are accurately set forth in the decision of the Court of Appeals and are adopted and incorporated herein.

The State argues that review of this case is appropriate under RAP 13.4(b)(2), RAP 13.4(b)(3), and RAP 13.4(b)(4). Specifically, the State argues: (1) review is appropriate under RAP 13.4(b)(2) since the decision of the Court of Appeals in this case "highlights the Court of Appeals' conflict over whether to follow the *Stalker* rule or the *Grisby* rule" of horizontal stare decisis; and (2) review is appropriate under RAP 13.4(b)(3) and RAP 13.4(b)(4) because the Washington State Constitution created a single court of appeals and the question of whether the divisions of the Court of Appeals may issue inconsistent opinions or if the principle of horizontal stare decisis requires the first opinion to be issued by any division be followed by all other divisions is a significant question of law under the Washington Constitution and is an issue of substantial public interest.

The State's arguments fail.

II. Response

1. The State fails to show that review of this case is appropriate under RAP 13.4(b)(2) because the State fails to show that the decision of the Court of Appeals in this case is in conflict with a published decision of the Court of Appeals.

Under RAP 13.4(b)(2), "A petition for review will be accepted by the Supreme Court only...[i]f the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals."

The State labors mightily to create an argument that the Court of Appeals decision in this case highlights a conflict in decisions of the Court of Appeals regarding the doctrine of horizontal stare decisis. However, in order to make its argument, the State misrepresents the holding of the Court of Appeals in this case as well as the holdings of the Court of Appeals in *State v. Stalker*, 152 Wn. App. 805, 219 P.3d 722 (2009) and *Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015). A review of these decisions reveals that there is, in fact, no conflict between them.

a. There is no conflict in the Court of Appeals over whether to follow the "Stalker rule" or the "Grisby rule" because there is no "Stalker rule" or "Grisby rule" regarding horizontal stare decisis.

i. *Stalker*

In *Stalker*, Division I of the Court of Appeals was concerned with whether should overturn its earlier decision of *State ex rel. Fitch v.*

Roxbury Dist. Court, 29 Wn.App. 591, 629 P.2d 1341 (1981) based on the State's argument that "subsequent case law has undermined that holding."[1] The *Stalker* court declined to overrule *Roxbury*, reasoning that

> Courts do not "lightly set aside precedent." The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society...and to allow trial judges to make decisions with a measure of confidence. The doctrine of stare decisis provides this necessary clarity and stability in the law, gives litigants clear standards for determining their rights, and "prevent[s] the law from becoming 'subject to incautious action or the whims of current holders of judicial office.'"
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> ***
>
> Our Supreme Court has held that it will overrule precedent only when such precedent is both incorrect and harmful. We apply the same standard for overruling precedent as does the Supreme Court. Therefore, we will abrogate the holding of a prior decision only if the party seeking to have the decision overruled has demonstrated that the precedent is both incorrect and harmful.[2]

What is key to note is that Division I in the *Stalker* case was discussing what test it would apply to overruling a prior decision <u>of Division I, **not** another Division of the Court of appeals.</u> The *Stalker* decision in no way discusses horizontal stare decisis between the divisions of the Court of Appeals and did not create a rule relating to horizontal stare decicis. If the *Stalker* court could be said to have created a rule regarding stare decicis, that rule would be that a division of the Court of

[1] *Stalker*, 152 Wn. App. at 808, 219 P.3d 722.

Appeals deciding whether to overrule a prior decision of **that division** examines the prior decision to determine if the prior decision is incorrectly decided and harmful. However, even if *Stalker* were considered to have created a "rule," Division I soon abandoned that "rule" in *Grisby*.

ii. *Grisby*

In *Grisby*, Division I of the Court of Appeals was forced to determine which of two prior **Division I** decisions with conflicting interpretations of the same US Supreme Court opinion Division I should follow. The *Grisby* court ultimately chose one opinion to be controlling, but in doing so engaged in an in-depth discussion of stare decisis with regards to a division of the Court of Appeals being bound by a prior decision of the Court of Appeals.

The *Grisby* court began its analysis by noting that, "The various panels of the Court of Appeals strive not to be in conflict with each other because, like all courts, we respect the doctrine of stare decisis."[3] The court then discussed how the Washington Supreme Court has ruled that "litigants who ask the court to overrule a prior decision must show that the prior decision is both incorrect and harmful"[4] but noted that "[o]nly a few Court of Appeals opinions have expressly applied the same test or

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[2] *Stalker*, 152 Wn. App. at 810-811, 219 P.3d 722.
[3] *Grisby v. Herzog*, 190 Wn. App. 786, 807, 362 P.3d 763 (2015).
[4] *Grisby*, 190 Wn. App. at 807, 362 P.3d 763.

indicated that parties must brief it."[5]

The *Grisby* court clarified that, "[t]echnically speaking, one panel of the Court of Appeals does not 'overrule' a decision of a previous panel,"[6] and discussed how the "rule" announced in *Stalker* that "the strict standard for overruling" a prior decision of the Court of Appeals was the same "incorrect and harmful test" applied in the Supreme Court was actually dicta that did not create a mandatory test:

> In *Stalker*, the court determined that "the strict standard for overruling" a prior case had not been met. *Stalker*, 152 Wn.App. at 814, 219 P.3d 722. Of course it is not inappropriate for this court to consider whether a previous opinion is incorrect and harmful in the course of deciding whether or not to follow it. **But as discussed above, this court does not overrule prior decisions**. Consequently, **it is not obligatory for this court to use, or for parties to brief in this court, a standard developed by the highest state court for its own use in determining whether to overrule one of its own decisions**. *Stalker*'s contrary dicta should not be taken as a new requirement to be met in briefs and argument before the Court of Appeals.[7]

"[I]mplicitly reconiz[ing] that only the Supreme Court can overrule a Court of Appeals decision," the *Grisby* court set out a series of clear and easily followed guidelines about how a conflict in the decisions of the Court of Appeals is resolved:

> Where "the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals," a basis

[5] *Grisby*, 190 Wn. App. at 808, 362 P.3d 763.
[6] *Grisby*, 190 Wn. App. at 808, 362 P.3d 763.
[7] *Grisby*, 190 Wn. App. at 810 n. 6, 362 P.3d 763 (emphasis added).

> exists for a petition for discretionary review by the Supreme Court. RAP 13.4(b)(2). If the most recent Court of Appeals opinion overruled conflicting Court of Appeals decisions and replaced them as binding precedent and controlling authority, no decisions would be in conflict and RAP 13.4(b)(2) would no longer serve any purpose as a basis for discretionary review. The Supreme Court settles the law when Court of Appeals decisions are in conflict. It follows that two inconsistent opinions of the Court of Appeals may exist at the same time. We have found no Court of Appeals opinion that actually states it is overruling an earlier Court of Appeals opinion. When one of our panels concludes that a previous Court of Appeals decision used a faulty legal analysis or has been undermined by some new development in the law, the opinion will usually state simply that the panel "disagrees with," "departs from," or "declines to follow" the other opinion.[8]

Thus, in *Grisby* Division I retreated from its holding in *Stalker* that the Court of Appeals could overrule an earlier Court of Appeals case following a showing that the earlier case was "incorrect and harmful." Instead, the *Grisby* court established that "two inconsistent opinions of the Court of Appeals may exist at the same time" and the existence of this conflict creates "a basis...for discretionary review by the Supreme Court" because "the Supreme Court settles the law when Court of Appeals decisions are in conflict." If one panel of the Court of Appeals concludes that a previous Court of Appeals decision is incorrect, the panel simply states that it "disagrees with," "departs from," or "declines to follow" the other opinion, it does not overrule it.

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[8] *Grisby*, 190 Wn. App. at 809–10, 362 P.3d 763 (internal citations omitted).

Grisby did not announce a rule regarding horizontal stare decisis. The *Grisby* court simply reaffirmed that conflicting Court of Appeals decisions may exist and that RAP 13.4 is the means by which conflicts between appellate decisions is resolved. There is no "*Stalker* rule" or "*Grisby* rule," there is only RAP 13.4.

b. The Decision of the Court of Appeals in this case was based on concerns for Fifth Amendment due process issues, not on concerns about horizontal stare decicis.

In rendering its decision in Mr. Arnold's PRP, Division III first identified and defined horizontal stare decisis as it exists in the Supreme Court and then briefly discussed horizontal stare decisis and how it has been applied by divisions of the Court of Appeals in reviewing the correctness of a prior decision of that division:

> When it comes to our state Court of Appeals, application of horizontal stare decisis has been less clear. Our courts have applied the doctrine to prior decisions issued by the same division. However, no case has explicitly adopted stare decisis for decisions issued by a different division.[9]

Division III then stated explicitly that it was "not prepared to resolve the question of exactly how stare decisis applies in the current context, involving decisions issued by other divisions," but noted that it was "[n]evertheless...apparent that stare decisis must apply at least to

[9] *In re: Arnold*, 2017 WL 1483993 at *3 (2017) (internal citations omitted).

some degree, otherwise [the Court] face[d] vexing problems."[10]

The "vexing problem" Division III was concerned with was that

> Because one panel decision cannot overturn a prior contrary decision, "two inconsistent opinions ... may exist at the same time," *Grisby v. Herzog*, 190 Wn.App. 786, 809, 362 P.3d 763 (2015), both with binding force over trial courts and litigants throughout the state. This creates a potential problem for the liberty interests of our state's citizens. The issuance of conflicting decisions about what an individual must do to abide by the law, each of which is equally binding, would call the very constitutionality of our system of appellate jurisprudence into question. *See Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) ("the Government violates [the Fifth Amendment guarantee of due process] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement").
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> The harm caused by failing to follow *Taylor* and *Wheeler* under stare decisis is salient here. Regardless of whether *Taylor* and *Wheeler* were incorrectly decided, parting company at this point would create unjustified harm by rendering the applicable law impermissibly vague.[11]

Division III was concerned with horizontal stare decisis only because horizontal stare decisis allowed for conflicting opinions from the Court of Appeals to exist that would all be binding on lower courts and the citizens of Washington. The court recognized that having conflicting decisions about the issue of whether sex offenders in situations like Mr. Arnold's or like those in *Wheeler* and *Taylor* were required to register

[10] *In re: Arnold*, 2017 WL 1483993 at *3 (2017).

would create a registration law that was so vague it would violate the Fifth Amendment's due process requirement that a law must give ordinary people fair notice of the conduct it punishes and must not invite arbitrary enforcement:

> The facts of this case make the practical problems of disagreeing with *Taylor* and *Wheeler* apparent. After his conviction, Mr. Arnold was sent a notice by the sheriff's department stating he no longer needed to register as a sex offender based on *Taylor*. Presumably other similarly situated individuals were also sent notices. What steps would the sheriff's department need to take if we issued a decision contrary to *Taylor*? Because we cannot overturn *Taylor*, it would not be able to advise individuals that its prior notice was incorrect. Yet the failure to advise individuals of a decision contrary to *Taylor* would frustrate the State's desire to increase sex offender registrations. Our court strives to solve problems, not create them. But departing from *Taylor* and *Wheeler* would do just that.
>
> We decline to upend settled expectations throughout the state by rejecting *Taylor* and *Wheeler*. The harm of doing so is too great.[12]

Division III did not, as the State claims, "decline to deviate" from *Taylor* and *Wheeler* because it felt it had to "adhere to the principle of stare decisis." Rather, Division III recognized that under *Grisby* conflicting decisions of the Court of Appeals may exist and that Division III could, in fact, disagree with *Taylor* and *Wheeler*. Division III **chose** to not disagree with *Taylor* and *Wheeler* because doing so would prevent the

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[11] *In re: Arnold*, 2017 WL 1483993 at *3 (2017).
[12] *In re: Arnold*, 2017 WL 1483993 at *3-4 (2017).

due process problems discussed above.

Conflicting opinions may exist in the Court of Appeals and decisions of one division of the Court of Appeals are, at most, only persuasive, not binding, authority to another Division of the Court of Appeals. Division III's decision in this case does not "highlight a conflict" in the Court of Appeals about the application of horizontal stare decisis. Rather, the opinion demonstrates proper recognition of the nuances of horizontal stare decisis and a deliberate effort to apply those principles in a just and constitutional manner. The State may disagree with the decision, but that does not mean that this Court should accept review of the case.

c. The discussion of horizontal stare decisis in the concurring and dissenting opinions does not create a basis for review by this court.

As discussed above, there is no conflict between Division III's majority opinion in this case and Division I's opinions in *Stalker* and *Grisby*. The State attempts to manufacture a conflict by focusing on the two concurring and one dissenting opinions issued by Division III.

Judge Pennell's concurring opinion (wherein he clearly indicates he wrote separately "to provide [his] thoughts on how stare decisis should

function within our appellate court")[13] indicates that he agrees with *Grisby* that the Court of Appeals cannot overrule a prior appellate decisions, but believed that the Court of Appeals should not reject a prior appellate decision unless it is both harmful and incorrect.[14]

In her concurring opinion, Judge Siddoway agreed with *Grisby* that the "incorrect and harmful" standard did not apply to the Court of Appeals, but agreed that

> the harm that will ensue if we do not follow the decisions of our fellow divisions in *State v. Taylor*, 162 Wash.App. 791, 259 P.3d 289 (2011) and *In re Personal Restraint of Wheeler*, 188 Wash.App. 613, 354 P.3d 950 (2015) is a compelling consideration and a sufficient reason to follow that authority and grant Eddie Arnold's personal restraint petition.[15]

In his dissent, Judge Lawrence-Berrey stated his belief that the majority opinion "adopts a stare decisis rule for future Court of Appeals panels to apply" and "the rule prevents correcting a prior holding unless the panel determines that the prior holding is both incorrect and harmful."[16] However, given the statement in the majority opinion that Division III was "not prepared to resolve the question of exactly how stare

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[13] *In re: Arnold*, 2017 WL 1483993 at *4 (2017).
[14] *In re: Arnold*, 2017 WL 1483993 at *5-6 (2017).
[15] *In re: Arnold*, 2017 WL 1483993 at *5-6 (2017).
[16] *In re: Arnold*, 2017 WL 1483993 at *7 (2017).

decisis applies in the current context,"[17] Judge Lawrence-Berrey's criticism is not supported by the clear language of the majority opinion.

Where a question presented for review to the Supreme Court is purely academic, the Supreme Court "is not required to pass upon it and will not do so however much both parties desire such a determination."[18] A question is moot when it presents purely academic issues and the court can no longer provide effective relief.[19] "Academic" is defined as "theoretical."[20]

The debate in the concurring and dissenting opinions about what rule applies in the Court of Appeals in choosing when not to follow a prior decision is an example of a purely academic issue about which the Supreme Court cannot offer Mr. Arnold any relief. The dispute between Mr. Arnold and the State was about the interpretation of RCW 9A.44.130 and RCW 9.94A.030, not about horizontal stare decisis. Horizontal stare decisis is not an issue that was raised to the trial court or briefed in the Court of Appeals. Even if horizontal stare decicis had been an issue raised by either party, Division III resolved both the statutory interpretation and the stare decisis questions the issue the same as Divisions I and II while

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[17] *In re: Arnold*, 2017 WL 1483993 at *3 (2017).
[18] *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); *see also State v. Gentry*, 125 Wn.2d 570, 616-617, 888 P.2d 1105 (1995).
[19] *Klickitat County Citizens Against Imported Waste v. Klickitat County,* 122 Wn.2d 619,

also holding that it was not bound to do so. All divisions of the court of Appeals have agreed that Mr. Arnold was entitled to relief. All divisions of the Court of Appeals agree on the rules of horizontal stare decisis. This court can no longer provide relief to Mr. Arnold since full relief was given, rendering this issue moot.

In addition to being moot, the issue of horizontal stare decisis is not ripe for review by this court. A controversy is ripe for review when,

> (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that are direct and substantial rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.[21]

There is no actual, present, and existing dispute between the parties or the divisions of the Court of Appeals about the rules of horizontal stare decisis. Even if there were such a dispute it would be purely academic. This case presents no issue of horizontal stare decisis that is ripe for review.

2. The State fails to show why review is proper under RAP 13.4(b)(3) and (b)(4).

As discussed above, The State has failed to show a conflict in the

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631, 860 P.2d 390, 866 P.2d 1256 (1993).
[20] *Black's Law Dictionary*, Seventh Edition (1989), at p. 11.
[21] *Rosemere Neighborhood Ass'n v. Clark Cty.*, 170 Wn. App. 859, 888, 290 P.3d 142,

Divisions of the Court of appeals about the interpretation of RCW 9A.44.130 and RCW 9.94A.030 or in the interpretation of the rules of stare decisis. The majority opinion in Mr. Arnold's appeal agreed with *Taylor* and *Wheeler* and also agreed with the rules of horizontal stare decisis as set forth in *Grisby*. Because there is no dispute for this court to resolve, there is no significant question of law under either the State or Federal Constitution or an issue of substantial public interest. The State clearly is dissatisfied with how all divisions of the Court of Appeals resolved the issue of interpreting RCW 9A.44.130 and RCW 9.94A.030, but the State has failed to make a valid argument as to why review is appropriate in Mr. Arnold's case.

III. CONCLUSION

The State fails to present an issue for review that is not purely academic, moot, nonexistent, or not yet ripe for review. There is no conflict between the divisions of the Court of Appeals about how to interpret RCW 9A.44.130 and RCW 9.94A.030 or about the rules of horizontal stare decisis.

For the reasons stated above, this court should deny the State's Petition for Review and decline the State's invitation to upset settled and uniform interpretations of the issues in this case.

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159 (2012).

DATED this 19th day of June, 2017.

Respectfully submitted,

Reed Speir, WSBA No. 36270
Attorney for Angela Feller

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of June, 2017, I delivered via US mail a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Eddie Arnold
1217 North Lincoln Street, Apt. 4
Spokane, WA 99201

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Gretchen Eileen Verhoef
Lawrence Henry Haskell
Spokane County Prosecuting Attorney's Office,
1100 W. Mallon Avenue
Spokane, WA 99260

Signed at Tacoma, Washington this 19th day of June, 2017.

Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

June 19, 2017 - 10:39 AM

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